

The Earthgrains Company, Inc. and Jeff Gordey and Bakery, Confectionery, and Tobacco Workers International Union, Local 149. Cases 26–CA–18630 and 26–CA–18717

August 17, 2001

DECISION AND ORDER

**BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND TRUESDALE**

On December 1, 1999, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Bakery, Confectionery, and Tobacco Workers International Union, Local 149 (the Union), each filed an answering brief, and the Respondent filed a reply to each. The General Counsel also filed exceptions and a supporting brief, and the Respondent filed an answering brief to these exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, as modified here,² and to adopt the recommended Order³ as modified below.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent's brief in support of exceptions essentially makes just two procedural arguments: (1) that the judge erred by failing to draw an adverse inference from the Union's failure to comply fully with a subpoena duces tecum, and, on the basis of that inference, to find that the Union is defunct and therefore not a labor organization within the meaning of Sec. 2(5); and (2) that the judge's decision lacks findings, conclusions, and reasoning on all issues presented sufficient to meet the minimum requirements of due process and the Administrative Procedure Act. We find no merit in these arguments.

² The Respondent has moved to strike the exhibits to the Union's answering brief. As the exhibits are not part of the record as defined in Sec. 102.45(b) of the Board's Rules and Regulations, we find it unnecessary to pass on the Respondent's motion to strike the exhibits. We deny the Respondent's motion to strike portions of the Union's brief itself. Those portions address matters dealt with at the hearing.

We deny the General Counsel's request to disregard the Respondent's references to its brief to the administrative law judge. The Respondent was merely stating that arguments made in support of exceptions had previously been made to the administrative law judge. We also deny the Respondent's motion, in response to the General Counsel's request, to incorporate its brief to the administrative law judge into the record.

³ In accord with the General Counsel's exceptions, we shall modify the remedial Order and notice to include a requirement that the Re-

1. We affirm the judge's finding that the Respondent violated Section 8(a)(5) of the Act during the term of collective-bargaining agreements for two bargaining units by withdrawing recognition from the Union, ceasing to apply contract terms, bypassing the Union, and refusing to process grievances with respect to certain historically represented unit employees. Contrary to our dissenting colleague, we find no need for a remand and further analysis by the judge. There is substantial record support for the judge's finding that the Respondent's consolidation of its existing operations with a recently purchased company (CooperSmith) did not affect the appropriateness of the bargaining units or the Respondent's obligation to recognize the Union as representative of those units, as enlarged by the accretion of CooperSmith employees. Specifically, the record shows that: the Respondent continues to produce and distribute bakery products without substantial changes in operations; employees from the historically represented units comprise a majority in each overall expanded unit; no other labor organization represented the CooperSmith employees; and those employees share a community of interests with the previously represented employees in the consolidated operations. See, e.g., *ABF Freight System*, 325 NLRB 546, 559–561 (1998); *Central Soya Co.*, 281 NLRB 1308 (1986).

2. We also affirm the judge's finding that the Respondent violated Section 8(a)(3) of the Act by constructively discharging employee Neal. Neal was a formerly represented employee in one of the facilities where the Respondent unlawfully withdrew recognition after the CooperSmith consolidation. After consolidation, the Respondent unlawfully refused Neal a promised promotion to a sales route, refused to process his grievance, and told him, according to Neal's credited testimony, that "if I would leave the union alone and kept my nose clean, I would have got a route." In affirming the judge's finding of constructive discharge, we rely on the Hobson's Choice theory of constructive discharge applicable to employees who, like Neal, quit after being confronted with a choice between resignation or continued employment conditioned on relinquishment of statutory rights. See, e.g., *Intercon I (Zercom)*, 333 NLRB No. 30 (2001); *Control Services*, 303 NLRB 481, 485 (1991). In this case, although the Respondent did not literally threaten to discharge Neal, we find that the foregoing statement to him was a clear and unequivocal signal that not only would the Respondent refuse to employ him in the job to which he was entitled but his future in any job was con-

spondent process a grievance concerning the discharge of employee Jeff Gordey.

tingent on abandonment of insistence on union representation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, The Earthgrains Company, Gulfport and Meridian, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete current paragraph 2(f), insert the following as paragraphs 2(f) and (g), and reletter all subsequent paragraphs.

“(f) Upon request, process a grievance regarding the Respondent’s discharge of employee Jeff Gordey on April 30, 1998, in accordance with the terms of the collective-bargaining agreement.

“(g) Within 14 days after service by the Region, post at all its facilities in Mississippi copies of the attached notice marked “Appendix.”³² Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at those locations at any time since April 30, 1998.”

2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN HURTGEN, dissenting in part.

I dissent in two respects: (1) concerning the refusal to recognize the Union; (2) concerning the alleged constructive discharge of employee Neil.

1. In regard to the Respondent’s allegedly unlawful refusal to recognize and bargain, I would remand for further proceedings before the judge. Earthgrains (a bakery) had a bargaining relationship with the Union in two separate units. The Meridian unit covered facilities in Meridian, Columbus, and other cities in Mississippi. The Gulfport unit covered facilities in Gulfport, Laurel, Hattiesburg, and other cities in Mississippi.

The Respondent purchased CooperSmith, a nonunion bakery. As a consequence, there were two facilities in some cities. The Respondent therefore consolidated facilities. In some cities, Respondent consolidated into

cilities. In some cities, Respondent consolidated into the Earthgrains facility; in others, Respondent consolidated into the CooperSmith facility. With respect to those facilities which would produce and package under the Earthgrains label, the Respondent recognized (or continued to recognize) the Union.¹ With respect to those that would produce and package under the CooperSmith label, Respondent refused to recognize the Union. There were four such facilities (Columbus, Meridian, Laurel, and Hattiesburg). This case concerns those four facilities. In Columbus, the operating facility is the old Earthgrains facility. In the other three, it is the new CooperSmith facility.

The judge concluded that the Columbus and Meridian facilities remained a part of the Meridian unit, and that recognition must continue there. Similarly, the judge concluded that the Laurel and Hattiesburg facilities remained a part of the Gulfport unit, and that recognition must continue there.

In reaching his conclusion, the judge applied the “contract bar” doctrine. That is, the contracts concerning the two units were still within the contract-bar period, and thus Respondent could not withdraw recognition for any part of that unit.

In my view, the judge has placed the proverbial cart before the horse. The real issue is whether the newly acquired CooperSmith employees are appropriately a part of the two respective units. If they are, the contract bar principle would apply, and recognition would be required. If not, recognition would not be required. Thus, the critical issue is whether the newly acquired employees are appropriately a part of the two units, and, if so, on what basis.

I recognize that where individual employees are newly hired into a unit, they ordinarily become part of that unit. However, in the instant case, a large number of employees were added by reason of a purchase of another company. In addition, in three of the facilities, the employees now occupy the newly acquired facility. Further, in all instances, the product label has changed.²

The judge also relied upon the asserted fact that the two units remain appropriate. However, the issue is not whether the units are appropriate. That issue would be germane if a party were seeking an election. The issue here is whether the new employees can be added to the unit without a vote.

My colleagues state that the judge found that the CooperSmith employees were an accretion to the Respondent’s existing bargaining units. However, the judge failed to provide any “accretion” analysis. Further, my colleagues find accretion because the CooperSmith

¹ There are no 8(a)(2) charges as to these facilities.

² In view of the foregoing, the judge’s conclusion that there has been “no substantial change” in either unit is at least questionable.

employees share a “community of interests” with the previously represented employees. In my view, accretion requires a finding of “overwhelming community of interests.” See my dissent in *The Sun*, 329 NLRB 854 (1999), and cases cited therein. A remand is necessary so that the judge and the Board may make fully reasoned findings.

Based on the above, I would remand for further analysis, including a reopening of the record if appropriate.

2. I do not agree with the judge or my colleagues that the Respondent constructively discharged employee Thomas Neil in violation of Section 8(a)(3).

To establish a constructive discharge under Board precedent as set forth in *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976), the General Counsel must establish that:

First, the burdens imposed upon the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee’s union activities.

Here, as set forth by the judge, the Respondent’s unlawful acts—which purportedly led Neil to resign—were as follows. Respondent failed to process a Neil grievance, in violation of Section 8(a)(5). It also denied Neil a promotion and told him that his filing the grievance had prevented his being promoted. I accept the fact that the Respondent took this step because of his grievance-filing.

However, the Respondent’s actions surely did not make Neil’s employment conditions so intolerable as to force him to resign. As I have stated previously, not every employer retaliatory act against an employee justifies that employee’s quitting.³ Here, the Respondent did not change Neil’s current assignments or impose new, onerous working conditions on him. Rather, it denied him advancement and told him it was because of his protected activity. Neil surely could have continued his existing employment and filed a charge over being denied a promotion.

Further, contrary to my colleagues, the Respondent did not present Neil with a “Hobson’s Choice.” Neil was not threatened with discharge. Nor was he faced with the choice of resignation and giving up his Section 7 rights. At worst, he was faced with a denial of a promotion. As I stated in my dissent in *Intercom I (Zercom)*, 333 NLRB No. 30 (2001), a “Hobson’s Choice” theory of constructive discharge must be limited to circumstances where an employee is faced with a “stark choice” of (1) ceasing

Section 7 activity and (2) discharge. That test is clearly not met here.

In my view, the majority stretches the constructive discharge principal far beyond the circumstances that it was intended to protect. That is, the doctrine should protect an employee whose working conditions are made intolerable because of unlawful employer actions. Here, in effect, under the majority’s holding, an employee who is unlawfully denied a new benefit can quit and be deemed a constructive discharge. Surely, in this context, an employee is not forced to resign. Thus, I dissent from my colleagues’ unwarranted extension of the constructive discharge doctrine.⁴

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Bakery, Confectionery & Tobacco Workers Local Union No. 149, as collective-bargaining representative of the employees in sales at our Columbus, Laurel, Hattiesburg, and Meridian, Mississippi depots.

WE WILL NOT refuse to apply the terms of the applicable collective-bargaining contract and we will not unilaterally change wages, hours, and terms and conditions of employment of our employees in sales at our Columbus, Laurel, Hattiesburg, and Meridian, Mississippi depots.

WE WILL NOT bypass the Union and deal directly with unit employees.

WE WILL NOT refuse to process grievances.

WE WILL NOT constructively discharge our employees because of the Union.

³ See my dissenting opinions in *Georgia Farm Bureau Mutual Insurance Cos.*, 333 NLRB No. 100 (2001); *L.S.F. Trucking, Inc.*, 330 NLRB 1054 (2000), and *Consec Security*, 325 NLRB 453 (1998).

⁴ As discussed above, I agree that the denial of a promotion was unlawful. Thus, Neil is entitled to the difference between the pay of his old job and the pay of the promotion job. However, because Neil voluntarily quit, the backpay would be tolled as of the quit and he would not be awarded the promotion job.

WE WILL NOT threaten our employees that employees would be denied route sales representative jobs for filing grievances under the collective-bargaining agreement.

WE WILL NOT threaten that employees would have been given jobs if they kept their noses clean and left the union mess alone.

WE WILL NOT threaten that employees had no grievance procedure because the Union did not represent them.

WE WILL NOT threaten that there was no union anymore.

WE WILL NOT threaten that there was nothing the Union could do about unilateral changes in working conditions and that supervision did not think highly of a supervisor that recommended the promotion of an employee that had filed a grievance.

WE WILL NOT threaten that we may unilaterally change wages, hours, and terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Bakery, Confectionery & Tobacco Workers, Local Union No. 149, as collective-bargaining representative of employees in sales at our Columbus, Laurel, Hattiesburg, and Meridian, Mississippi depots.

WE WILL offer immediate and full reinstatement to Thomas Neil to a route sales representative job and WE WILL make Neil whole for all losses because of our unlawful refusal to grant his request for a route sales representative job and because of his unlawful constructive discharge.

WE WILL on request, process a grievance relating to the discharge of employee Jeff Gordey on September 30, 1998, in accordance with the terms of the collective-bargaining agreement.

THE EARTHGRAINS COMPANY

Susan Greenberg and Terance Madden, Esqs., for the General Counsel.

Joan Canny, Esq., of New Orleans, Louisiana, for the Respondent.

Barclay Roberts, Esq., of Memphis, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PARGEN ROBERTSON, Administrative Law Judge. This hearing was held in Jackson, Mississippi, on August 30 and 31 and September 1, 1999. The 26-CA-18630 charge was filed on May 5 and amended on August 28, 1998, and January 19, 1999. The 26-CA-18717 charge was filed on June 19 and amended on October 13, 1998, and January 14, 1999. A consolidated complaint issued on January 21 and was amended on June 28, 1999. In consideration of the full record including briefs filed by Respondent, Charging Party, and General Counsel, I make the following findings.

I. JURISDICTION

At all material times Respondent has been a corporation with a facility located in Meridian, Mississippi, where it has engaged in the production, sale, and distribution of bakery products. During the 12-month period ending December 31, 1998, Respondent in those business operations, purchased and received at its Meridian facility goods and materials valued in excess of \$50,000 directly from points outside Mississippi. Respondent admitted that it has been an employer engaged in commerce at material times.

II. LABOR ORGANIZATION

The record shows that Bakery, Confectionery, and Tobacco Workers International Union, Local 149 represented Respondent's Mississippi employees in regard to working conditions at relevant times. On the basis of that evidence I find that Local 149 is a labor organization.

However, Respondent contended that the Union is not a bona fide labor organization, that the Union is defunct, is not competent to act as an exclusive collective-bargaining representative and has a disqualifying conflict of interest. In view of my finding that Local 149 is a labor organization, Respondent has the burden of proving its contentions.

The International placed Local 149 under trusteeship in September 1998. Nevertheless, there was no evidence in the record showing that the Local is defunct. In fact the record shows to the contrary that the Local on its own and after September 1998, through the Trustee, has continued to bargain with Respondent by negotiating collective-bargaining agreements and processing grievances. Indeed as shown herein, it is the Respondent that has unlawfully refused to negotiate and has refused to process grievances. See *Pioneer Inn Associates*, 228 NLRB 1263 (1977), *enfd.* 578 F.2d 835 (9th Cir. 1978).

Respondent argued that Local 149 does not know whom it represents. As shown herein relevant collective-bargaining agreements reflect that Local 149 represents employees out of Meridian and out of Gulfport. Those contracts do fail to specifically include all depots and other facilities but the record shows that the parties have consistently agreed to similar recognition clauses and have applied those clauses to specific facilities out of Meridian and out of Gulfport. The record also shows that Local 149 filed a petition to represent employees already included in a recognized unit. Nevertheless, I am not convinced on the basis of that evidence that Local 149 is not a bona fide labor organization, that the Union is defunct, is not competent to act as an exclusive collective-bargaining representative or has a disqualifying conflict of interest. The geographic areas included in the relevant collective-bargaining contracts are large and the contracts have included only a general recognition clause. It appears unlikely there would not be some confusion as to which employees are included in the respective units. However, there was no showing that Local 149 has failed to diligently represent employees in those units.

"Local 149 has ceased to exist by operation of the International constitution." Here, Respondent is referring to the International's action in placing Local 149 in trusteeship. Respondent cited authority for the proposition that where an international union's constitution makes provisions for trusteeship only when the local retains at least 10 members because if the number fell below 10 the local disappears and there is nothing to impose a trusteeship on, as showing that Local 149 has disappeared. However, there was no evidence to show that Local 149 has disappeared. There was no showing that the Local has failed to maintain a constitutionally required minimum number of members. Respondent argued that the Trustee has failed to comply with the procedural requirements of hearings under the International constitution. Nevertheless, there is no showing that those failures have resulted in the Local disappearing.

Respondent argued there was no continuity of representation after appointment of the Trustee. Respondent contended that the Local's failure to comply with requirements of its subpoena duces tecum shows there was no continuity of representation. However, there was no evidence supporting Respondent. The evidence shows that both Local 149 and since September 1998, its Trustee, have continued to meet and negotiate with Respondent to the extent Respondent was willing to bargain.

"Local 149 should be disqualified" "due to a breach of its duty of fair representation and a proximate danger of conflict of interest." In essence, Respondent argued that the Trustee must be concerned with paying the bills for Local 149 and that may conflict with the duty of fair representation. However, all labor organizations would fail to satisfy the standard argued by Respondent. Obviously, all those organizations must satisfy obligations including rent, salaries,

etc. I am unaware of any requirement that such obligations constitute a disqualifying conflict of interest in the labor organizations' duty of fair representation. Respondent argued that the Trustee has authority to abuse the Local's duty of fair representation and that, unlike the Local itself, the Trustee may be unwilling to take steps in the interest of employees represented by the Local if those steps are not in the best interest of the International. Again, that argument could be made about any local union. The Trustee was not shown to have taken any steps that were not in the best interest of employees represented by the Local. The Board has found the existence of a trusteeship irrelevant to a union's status as a labor organization. *Stardust Hotel & Casino*, 317 NLRB 926 (1995).

Next, Respondent argued that the Union has breached its duty of fair representation. Respondent pointed out that the Union Trusteeship Hearing Board found there was considerable testimony that "grievances are not being promptly addressed" by the Local. Respondent also argued that the Trustee has failed to comply with the 6-month hearing requirements of the International Union constitution. Neither of those arguments shows that Local 149 or the Trustee failed to supply fair representation of employees. In fact it appears from the record that the International was vigilant in overseeing the Local's duty of fair representation in the actions, which resulted in the appointment of the Trustee.

Respondent contended that the Union failed to comply with a subpoena duces tecum. I found during the hearing that the Union had not fully complied. In that regard Respondent pointed to the "Bond Beebe Report" (R. Exh. 36); the "Notice of Trusteeship Hearing" (R. Exh. 37, 38, 40); LM-15 semiannual Trusteeship Report (R. Exh. 35); and LM-2 for Local 149 (R. Exh. 30, 31). Those documents show among other things, that Local 149 has experienced difficulty in meeting financial obligations.

Respondent's allegations involve serious matters. However, as shown by the various documents cited by Respondent, those matters have not gone unnoticed. Here, the questions involve alleged union activity by employees and Respondent's obligation to bargain with the employees' collective-bargaining agent. Despite the above allegations, Respondent has continued to recognize Local 149 and the Trustee, as representative of some of its employees and, as shown herein, has continued to bargain. The record evidence proved that action by Respondent is proper and in accord with its obligations under the National Labor Relations Act. Moreover, there was no evidence showing that Local 149 is not a labor organization. If the record had included prima facie evidence that Local 149 was not a labor organization, I would conclude that the Local's failure to comply with the subpoena carried the implication that requested information would be harmful to the Local's position and that the Local failed to overcome prima facie evidence. However, as shown above, I find that Respondent did not prove a prima facie case and the Union's failure to fully comply does not serve to supply substantial evidence in support of Respondent's argument. Moreover, I find that the International's imposition of Trusteeship on the Local was not sufficiently dynamic to alter Local 149's identity as bargaining representative and justify Respondent in withdrawing recognition at its Columbus, Laurel, Hattiesburg and Meridian, Mississippi depots. *Stardust Hotel & Casino*, supra.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent operated in Mississippi under the Earthgrains¹ name from 1996. Around January 16, 1998, Respondent acquired CooperSmith, Inc. At that time the Union represented Earthgrains employees. CooperSmith employees were not represented. CooperSmith had a bakery in Meridian and distribution depots in Meridian, Columbus, Laurel, and Hattiesburg, Mississippi. Earthgrains had a bakery in Meridian and facilities at Meridian, Columbus, Laurel, Hattiesburg, Tupelo, Forest, Greenville, Kosciusko, Vicksburg, Brookhaven, Philadelphia, Jackson, Magee, Grenada, Picayune, Yazoo City, Lucedale, Pascagoula, and Gulfport, Mississippi.

After the purchase of CooperSmith Respondent consolidated Earthgrains and CooperSmith operations in several Mississippi locations.² Respondent continued to recognize the Union in those local consolidated facilities that resulted in a continuation of the Earthgrains operations.

¹ Before 1996, Respondent was named Campbell-Taggart. It became Earthgrains in 1996.

² The consolidation started in April 1998 and continued for several months.

That was not the case in Columbus, Hattiesburg, Laurel, and Meridian.³ The Earthgrains sales depots in Hattiesburg, Laurel, and Meridian were closed and Respondent operated the CooperSmith depots in those cities. The Earthgrains Columbus depot was not closed but Respondent has not continued to recognize the Union there. Ron Thomason testified that the CooperSmith brand (Sunbeam) was the dominant brand⁴ in Columbus and even though the Earthgrains depot⁵ was used, the preserved operation was that of CooperSmith.⁶ From the time of the consolidation of Earthgrains and CooperSmith operations, Respondent withdrew recognition and it ceased applying the terms of any collective-bargaining contract in those locations where CooperSmith maintained dominant brand sales.⁷

The Earthgrains employees at the relevant Mississippi facilities⁸ immediately before the January 16 purchase are listed on attachment A to the parties' stipulation (J. Exh. 1) and the CooperSmith employees at relevant Mississippi facilities immediately before the January 16 purchase are listed on attachment B to the stipulation. Those Earthgrains employees listed on attachment A were represented by Local 1499 immediately before the January 16 purchase.

Respondent continued to recognize the Union as representative of the employees covered by the Meridian sales collective-bargaining contract in depots at Tupelo, Forest, Greenville, Kosciusko, Vicksburg, Philadelphia, Grenada, Jackson (except for employees employed as of 1986 that were covered by the Jackson sales contract no: 0226-20.170, by grandfathering), Magee, and Yazoo City and as representative of the employees covered by the Gulfport sales collective-bargaining contract no. 0220-21.145 at depots in Brookhaven, Picayune, Lucedale, Gulfport, and Pascagoula, after the purchase and consolidation.

Route Sales Representative Robert Sharp filed a grievance around March 26, 1998, protesting that he was laid off instead of being given an opportunity to bid on a route.¹⁰ Billy Tucker filed a grievance around May 18, 1998, protesting the transfer of work from Respondent's union to its nonunion facilities.

On April 8, 1998, Ervin Bradley (then business agent of Local 149) sent a letter to Bobby Snyder.¹¹ The parties stipulated that Snyder was Respondent's agent at material times. Snyder answered Bradley's letter on April 17, 1998.¹²

³ The parties stipulated that after the consolidation, Respondent ceased to apply the terms of collective-bargaining contracts in Columbus, Laurel, Hattiesburg, Meridian, Waynesboro, and Collins, Mississippi.

⁴ Thomason's testimony as to the dominant brand in particular locations was not disputed.

⁵ Thomason testified that the former Earthgrains depot was the only one in Columbus that was large enough to handle the consolidated operations but that the depot building was never a consideration as to whether the local Earthgrains or CooperSmith operation would continue.

⁶ Jeff Gordey testified that Thomason told him in early April 1998 that Respondent would be operating the Sunbeam way in Columbus. Ronnie Short testified that Thomason told him in April that the Columbus depot was no longer Earthgrains but would operate in the future as a CooperSmith facility.

⁷ Depot employees in Columbus, Laurel, Hattiesburg, Meridian (except for Respondent's bakery store location at 816 18th Avenue in Meridian), Waynesboro and Collins, Mississippi (J. Exh. 1, par. 9).

⁸ The parties also stipulated that Respondent and the Union are parties to Memphis, Tennessee collective-bargaining agreements covering employees at that bakery and covering Memphis sales employees.

⁹ Bakery, Confectionery, and Tobacco Workers International Union, Local 149.

¹⁰ Eric Hollingshead responded to Sharp's grievance on behalf of Respondent on March 27, 1998: "The CooperSmith routes in Laurel are not under the jurisdiction of Local 149 and therefore Robert (Sharp) has no contractual rights to bid on these routes."

¹¹ Exh. M (Exhibits noted by letter refer to exhibits to the parties' stipulation).

¹² Exh. N.

Jeff Gordey was separated from his Earthgrains employment around April 30, 1998. David Willis¹³ told Gordey that he “did not have anything for him.” Also around April 30, David Willis refused to accept a grievance from Gordey regarding Gordey’s discharge and Willis told Gordey that the “Union did not represent employees at the Columbus, Mississippi depot any more.” Gordey was not given severance pay.

On May 1, 1998, Thomas Neil asked Respondent for the route¹⁴ vacated by the discharge of Jeff Gordey. Neil did not receive the route. Local 149 wrote Bobby Snyder on May 19, 1998 (Exh. P).

The International placed Local 149 under trusteeship on September 9, 1998. Employee David Mixon filed a grievance over Respondent’s repudiation of the collective-bargaining agreement with respect to Columbus, Mississippi (Exh. Q). Ron Thompson returned the Mixon grievance to James Rivers, trustee for Local 149, along with a December 2, 1998 letter to Rivers (Exh. R).

Respondent distributes its products via a route sales system. It has bakeries where products are baked. From staging areas, transport drivers deliver the products to satellite facilities in various locations. Route sales representatives deliver the products to retail stores, arrange stock on store shelves, take customer orders, arrange advertising displays, and remove stale products. Loaders load and unload Respondent’s trucks with Respondent’s product. Respondent also maintains bakery, or thriftstores. Store sales employees operate those stores.

Before and after consolidation of Earthgrains and CooperSmith Mississippi operations, route sales representatives engaged in the duties set forth in paragraph 29 of the stipulation. The duties and responsibilities of Respondent’s route sales representatives, loaders, and bakery store employees at its Mississippi locations were substantially the same after the consolidation of Respondent’s operations in Mississippi as they were prior to the acquisition of CooperSmith.

The seniority lists for route sales representatives at the facilities at issue in the complaint are maintained separately for each location and not across all of Respondent’s locations in Mississippi or across all locations covered by a particular collective-bargaining agreement.

Ron Thomason is Respondent’s zone vice president of sales for the relevant geographical area. Thomason along with Bobby Snyder, visited all the depots and read a prepared statement regarding which of the local depots would remain open (R. Exh. 19).¹⁵ In addition to reading the prepared statement at each location, Thomason and Snyder answered questions from employees. Thomason testified that he was sure he offered some employees opportunities to transfer and he based his determination to grant a transfer on whether Respondent had openings in other areas and whether the employee was qualified to help with the transition to the Earthgrains program. Steve Smith, John Harper, and Mark Stewart were route sales representatives in Hattiesburg. All the Hattiesburg route sales representatives met individually with Bobby Snyder and Ron Thomason around June 9, 1998. Thomason told the employees that as of a specific date, Earthgrains would no longer exist and that the Earthgrains employees would need to inquire as to whether jobs were available. Smith asked his supervisor about a job and was told that he would have to wait and see. Around a week after first talking with his supervisor,

the supervisor, Mark Ray, told Smith that Smith would keep his route. Smith’s base pay changed from \$272 to \$185 a week and other changes occurred in his benefits package. Smith and Stewart were transferred from the old Earthgrains depot to the former CooperSmith depot around the time of the consolidation.

Stewart rejected an offered junior supervisor position. Supervisor Mark Ray told Stewart that Ron Thomason did not think too highly of Ray recommending Stewart for junior supervisor after Stewart filed a grievance with the Union regarding the consolidation. Ron Thomason denied that he offered a junior supervisor position to Mark Stewart and he denied that he told Mark Ray that he didn’t think highly of Ray’s attempt to promote Stewart to junior supervisor because Stewart had filed a grievance.

Respondent employs the interplant system of baking and distributing its product. The product is prepared in one location and transported to another for distribution. For example the Meridian bakery receives product prepared at several locations including Mobile and Fort Payne, Alabama; Rome, Georgia; Paris, Texas, and pies from Pennsylvania. The product is transported from the Meridian bakery to depots for final distribution.

Thomason had the responsibility of consolidating Earthgrains and CooperSmith operations. In cities with both Earthgrains and CooperSmith depots, Thomason elected to maintain that operation with the dominant brand before the consolidation. He measured “dominant brand”¹⁶ on the basis of market share and number of routes. Thomason did not consider whether Earthgrains used that or other indicia to make similar determinations in zones other than Mississippi. Thomason elected to keep Earthgrains operations in Jackson, Philadelphia and Forrest and CooperSmith operations in Columbus,¹⁷ Meridian, Laurel and Hattiesburg.

The parties stipulated that Jeff Gordey was separated from his Earthgrains employment around April 30, 1998. Supervisor David Willis testified that Gordey left work on April 25 with \$246 in company money to buy a money order. It was anticipated that Gordey would return with the money order so that it could be included in the mailbag to Meridian. However, Gordey did not return and he did not show for work on the next 2 scheduled workdays, Monday and Tuesday, April 27 and 28. Wednesday was not a workday. When Gordey showed up on Thursday, April 30, Willis told him they “didn’t have anything for him to do any more.” Gordey replied that was okay that it was time for him to move on.

That afternoon Gordey returned with some paperwork. He told Willis “it was grievances he had filed.” Willis admitted that he told Gordey “we were non-union depot and that I couldn’t take the grievances.”

The parties stipulated that on May 1, 1998, Thomas Neil asked Respondent for the route vacated by the discharge of Jeff Gordey. Neil did not receive the route. Local 149 wrote Bobby Snyder on May 19, 1998 (Exh. P).

David Willis testified that Tommy Neil was laid off when his route was discontinued. A few months later Neil was rehired as a dock loader after one of the other loaders retired. Neil said that he would like to have a route and Willis assured him that if a route came open Neil would be considered for the route. However, loaders had never been allowed to bid on routes before that time. After Jeff Gordey was terminated, Willis told Neil that Willie Williams was next in line for that route because Neil was not in sales.¹⁸ Willis told Neil that he would continue to consider Neil for a route provided Neil maintained a clean record. Willis also admitted that he told Neil “that filing a grievance and making folks mad, that made the decision to transfer him from one department to the other one wasn’t the way to get the route, something to that effect.”

Neil resigned around a month after Jeff Gordey was discharged.

¹³ Willis is a stipulated agent.

¹⁴ Neil made the request to Supervisor David Willis and the route was 63.

¹⁵ In both addresses where Thomason advised the employees of the closure of an Earthgrains and a CooperSmith depot, the written statement contained the following “consolidation strategies and business objectives”:

Participate in the consolidation of the fresh baked goods industry. The Earthgrains company acquired CooperSmith as part of a strategy to realize more cost synergies in manufacturing and sales. Without these synergies the acquisition would not have made good business sense.

Maintain the routes that currently have dominant share of the fresh goods market. This is important because brand/labels loyalty of consumers and customers is a critical element in the retail and consumer goods industry.

Increase route averages by adding CooperSmith labels onto Earthgrains routes and by reducing the overall total number of routes.

¹⁶ Thomason used the term “dominate brand” in describing whether CooperSmith or Earthgrains had the bulk of the business at a particular city before the consolidation.

¹⁷ Thomason testified that even though CooperSmith marketed the dominant brand in Columbus, the Earthgrains depot was the only one that would accommodate the larger number of routes needed after the consolidation. Therefore, only in Columbus the Earthgrains building was retained even though Thomason elected to retain the CooperSmith operations.

¹⁸ Willie Williams had lost his route during the consolidation.

Findings

Credibility

There was little disagreement as to the facts. As shown above, most of the relevant facts were stipulated. In my conclusions I shall state those facts which are not in dispute without mentioning credibility. Where there was disagreement I shall make credibility findings in the conclusions.

Conclusions

The alleged unlawful failure to recognize the Union and alleged unilateral changes at Respondent's consolidated depots at Columbus, Laurel, Hattiesburg, and Meridian, Mississippi:

Respondent's refusal to continue recognizing the Union at its Columbus, Laurel, Hattiesburg, and Meridian depots calls the Board's contract bar into question. There is no dispute but that the Columbus and Meridian depots were included in the Meridian sales collective-bargaining contract before the consolidation. That collective-bargaining agreement had a term of November 1, 1995, through October 30, 1998. There is no dispute but that the Laurel and Hattiesburg depots were included in the Gulfport sales collective-bargaining contract before the consolidation. That collective-bargaining contract had a term of March 10, 1996, through March 14, 1999. Under the contract bar rule an employer may not challenge the Union's majority status for the initial 3 years of a collective-bargaining contract. Respondent's alleged unlawful refusal to bargain over employees at the Columbus, Laurel, Hattiesburg, and Meridian depots from April 1998 fell within the initial 3-year term of each of those contracts. Only in unusual circumstances may an employer withdraw recognition within that initial 3 years (*Central Soya Co.*, 281 NLRB 1308, enf'd. 867 F.2d 1245 (1988)).¹⁹

After its January 16, 1998 purchase of CooperSmith, Respondent distributed both Earthgrains and CooperSmith brands. The consolidation of Earthgrains and CooperSmith Mississippi operations did not begin until April 1998. During its consolidation Respondent closed the former Earthgrains depots in Hattiesburg, Laurel, and Meridian and started using former CooperSmith depots in those cities. Respondent closed the former CooperSmith depot in Columbus and started using the former Earthgrains depot but allegedly because a CooperSmith bread was the dominant brand in that area, it used the CooperSmith operation out of that Earthgrains Columbus depot. Under *Central Soya*, the employer has the burden of proving that the bargaining unit has been altered to the point of being no longer appropriate. Here, as to both the Meridian and the Gulfport sales collective-bargaining agreements, there is no dispute as to the overall units. Respondent continued to recognize and bargain with the Union in depots within the Meridian unit other than Columbus and Meridian and within the Gulfport unit other than Laurel and Hattiesburg.

The Meridian sales contract included route sales representatives in Meridian and in depots in Columbus, Tupelo, Greenville, Kosciusko, Vicksburg, Philadelphia, some employees in Jackson, Magee, and Yazoo City, Mississippi. The Gulfport sales contract included route sales representatives in depots in Gulfport, Pascagoula, Lucedale, Laurel, Hattiesburg, and Brookhaven, Mississippi, and Mobile and Bay Monette, Alabama. The General Counsel pointed out that before the consolidation the Meridian sales bargaining unit included 47 employees. Thirteen former CooperSmith employees from Meridian, 10 former CooperSmith employees from other locations and 4 former CooperSmith employees from Columbus were added to the unit and the total number of employees in the unit rose to 74. The former CooperSmith employees did not constitute a majority of the Meridian sales bargaining unit. The Gulfport sales bargaining unit included 45 employees. Eight former CooperSmith employees and three new employees were added to the unit and the total number of employees in the unit rose to 56. The former CooperSmith employees²⁰ did not constitute a majority of the Gulfport sales bargaining unit.

Respondent failed to show that there were changes in business operations from before April 1998 until after the consolidation.²¹ Respondent continued to use route sales representatives to

distribute its product from the same locations as before the consolidation. In all its locations including the four at issue herein, Respondent continued to distribute the same products to the same customers from depots located in the same cities. The overall Meridian and Gulfport sales collective-bargaining units constituted a substantial portion of the State of Mississippi and the record illustrated that the location of a particular depot within each of those areas was incidental to its distribution process. The primary consideration in consolidation according to Ron Thomson was the dominant brand within the respective area. By keeping the depot or, as in the case of Columbus, the operations, Respondent sought to capitalize on its local dominant brand market.

Respondent argued that the consolidated Laurel, Hattiesburg, and Meridian depot employees were not included in extant collective-bargaining agreements.²² Instead the collective-bargaining agreements applied to the former Earthgrains depots at those locations. When those Earthgrains depots were closed new facilities were opened at the former CooperSmith depots and those depots were not included in the existing contracts. The use of newly acquired depots in Laurel, Hattiesburg, and Meridian do not constitute relocations. Moreover even if the newly acquired depots at Laurel, Hattiesburg, and Meridian are relocations of basically the same operations, the transferred employees do not constitute a substantial percentage of the new plant employee complement and therefore the collective-bargaining agreement does not remain in effect. The Laurel, Hattiesburg, and Meridian depots constitute separate appropriate bargaining units and under an accretion analysis Respondent is not obligated to recognize the Union at any of those three locations. Additionally, even though the Columbus Earthgrains depot continued in use, the operation became that of CooperSmith because of the dominant brand in that area. The transferred employees at that depot constitute a separate appropriate bargaining unit and Respondent is not obligated to recognize the Union in Columbus.

Despite Respondent's arguments, I am convinced that the threshold question must involve whether the two bargaining units became inappropriate. As to that issue, the record is clear. There was no evidence showing that either the Meridian or Gulfport sales bargaining units became inappropriate because of the consolidations or because of any other factor. *ABF Freight System*, supra. In fact Respondent continued to recognize the Union as representative of the employees in both those units. Nevertheless, Respondent argued: (1) The consolidated Laurel, Hattiesburg, and Meridian depots were not included in the extant collective-bargaining agreements; (2) The consolidated Columbus operation was not included in the existing collective-bargaining agreement; (3) The bargaining units are neither expanded nor consolidated units; and (4) The Laurel, Hattiesburg, and Meridian depots constitute separate appropriate units.

This is unlike some situations cited by Respondent where an employer moved its plant.²³ Respondent's decision to select one of two depots in a particular city did nothing to the overall collective-bargaining unit. Perhaps, as Respondent argued, the consolidated operations at Columbus, Laurel, Hattiesburg and Meridian would have constituted separate appropriate

meet with the Union "in an attempt to resolve any issues regarding any proposed changes in, or impact on, union jurisdiction, employees' job classifications, rates of pay, workload, job training, job elimination and the procedure for awarding newly created bargaining unit jobs."

²² The Union argued and Respondent does not appear to dispute that in Meridian and Gulfport, units originated in 1986 when Respondent bought Hardins Bakery. The "out of Meridian" unit included sales representatives, loaders and thrift store employees working in Meridian, Columbus, Tupelo, Greenville, Vicksburg, Jackson, Brookhaven, McComb, Magee, Philadelphia, Kosciusko, Forrest, Laurel, and Hattiesburg. After Respondent and the Union agreed that former Hardins employees working in Laurel, Hattiesburg, and Brookhaven would be subsumed into the Gulfport bargaining unit, that unit included route sales representatives and loaders in facilities in Gulfport, Pascagoula, Lucedale, Laurel, Hattiesburg, and Brookhaven, and in Mobile and Bay Monette, Alabama.

²³ Respondent cited *Harte & Co.*, 278 NLRB 947 (1986). There, the employer moved one of its two facilities, to another state. The Board in *Harte* agreed that the collective-bargaining contract should remain in effect if the operations were relocated and there was a sufficient continuity of operations.

¹⁹ See also *ABF Freight System*, 325 NLRB 546 (1998).

²⁰ Even a combination of former CooperSmith employees plus new employees did not constitute a majority of the consolidated Gulfport sales unit.

²¹ Respondent was obligated under art. XXXV of the Gulfport contract and art. XXX of the Meridian contract to, among other things,

bargaining units. However, that is not a relevant question to this inquiry. Here, I must look to the contractual units and determine whether there is a question of appropriate unit. Specifically, from Respondent's viewpoint, the best I can do under applicable law is question whether the Meridian and Gulfport sales bargaining units continue to be appropriate. *Trident Seafoods*, 318 NLRB 738 (1995). As shown above, even Respondent has recognized that those units continue to be appropriate. It has continued to recognize the Union in all the Meridian and Gulfport depots other than the four at issue.

Moreover, the issue of whether a depot was in one part or another part of that same city is of no substantial importance from a labor relations standpoint. The work locations of the employees at issue, the route sales representatives, were not in a depot. Those employees are truckdrivers. The drivers worked out of various depots but even on some of those instances the particular driver did not regularly appear at the depot. The evidence showed that on occasion the Respondent's product was dropped at other distribution points from which it was picked up and delivered by the route sales representative.

By moving a depot or retaining an operation, Respondent was in better position to take advantage of the customers' demands for a particular brand. The use of particular depots was not shown to have related to labor relations according to testimony of Ron Thomason. Instead, Respondent sought to continue successful marketing by making the local dominant brand available to its customers.

Moreover, as to Respondent's argument that the consolidated depots were not included in the existing collective-bargaining agreement, I find the record does not support Respondent. The language in the contracts' recognition clauses is extremely broad, referring to only Meridian and Gulfport. There is no disagreement but that from after the January 16 purchase of CooperSmith until the consolidation, Meridian included depots in Meridian, Columbus, Tupelo, Greenville, Kosciusko, Vicksburg, Philadelphia, some employees in Jackson, Magee and Yazoo City, Mississippi; and Gulfport included depots in Gulfport, Pascagoula, Lucedale, Laurel, Hattiesburg, and Brookhaven, Mississippi, and Mobile and Bay Monette, Alabama. Although Respondent closed those depots formerly included in the unit in Laurel, Hattiesburg, and Meridian, it opened former CooperSmith depots in those same three cities without a break in operations.

As to Respondent's argument that the units were neither expanded nor consolidated, Respondent mistakenly compares this situation to relocation of facilities including a complete or substantially complete bargaining unit. Here there was a contract bar in each of the two units involved and there was no substantial change in either unit. Only 2 depots out of approximately 10 depots out of Meridian and 2 out of approximately 8 depots out of Gulfport were changed and even those changes were not substantial. Those changes involved closing three Earthgrains depots and continuing to use three CooperSmith depots in the same cities, and continuing to use its Earthgrains depot but with CooperSmith operations out of Columbus. The consolidated sales and distribution operations were not shown by Respondent to have substantially changed from the operations involving both CooperSmith and Earthgrains in Columbus, Laurel, Hattiesburg, and Meridian from January 16 to April 1998. Before April, Respondent operated both Earthgrains and CooperSmith depots in those four cities but the products it distributed were the same as after April. The employees engaged in the same duties both before and after April.

As to Respondent's argument that the Laurel, Hattiesburg, and Meridian depots constitute separate appropriate units, I find that issue is not relevant to these proceedings. The question framed by the complaint rest on a determination as to the overall bargaining units out of Meridian and out of Gulfport. Regardless of whether other units may be appropriate or even more appropriate, I have determined herein that the units out of Meridian and Gulfport were not shown to be inappropriate.

Respondent argued that neither the Meridian nor the Gulfport sales collective-bargaining agreements applied by their terms, by longstanding practice or by operation of law to the newly acquired depots in Meridian, Laurel, or Hattiesburg. However, as Respondent correctly points out in its brief, the Meridian and Gulfport collective-bargaining agreements involved bargaining units out of Meridian and out of Gulfport. There is nothing in either contract pointing to specific depots. The parties are in agreement that from before January 1998 until the consolidation of operations beginning in April, the employees at Earthgrains depots in Meridian, Laurel, and Hattiesburg were included in one of those two collective-bargaining agreements. Respondent correctly pointed out that each of those cities also included a CooperSmith depot and the

Union did not represent employees at those depots. However, none of the depots in dispute, involved a separate collective-bargaining unit.

The record proved that the contract-bar rule should apply in this situation. That rule expresses a longstanding policy of the Board not to entertain any challenge to an incumbent union's majority status, absent unusual circumstances, during the term of a collective-bargaining agreement, not to exceed 3 years. Although Respondent questioned the Local's status as a labor organization, the record failed to support that argument and the record showed that the Local including its Trustee, has been willing and able to represent unit employees at relevant times. *Westwood Import Co. v. NLRB*, 681 F.2d 664 (9th Cir. 1982).

I find that Respondent unlawfully refused to recognize and bargain with the Union, it made unilateral changes in working conditions, it unlawfully refused to apply the terms of the Meridian sales contract to unit employees at the Meridian and Columbus depots, and it unlawfully refused to apply the terms of the Gulfport sales contract to unit employees at the Laurel and Hattiesburg depots, in violation of Section 8(a)(1) and (5) of the Act.

As shown above, Ron Thomason along with Bobby Snyder visited all the depots and read a prepared statement regarding which of the local depots would remain open (R. Exh. 19). All the Hattiesburg route salesmen met individually with Bobby Snyder and Ron Thomason around June 9, 1998, and Thomason said that as of a specific date, Earthgrains would no longer exist and that the Earthgrain's employees would need to inquire as to whether jobs were available. Steve Smith, John Harper, and Mark Stewart were route sales representatives in Hattiesburg. Smith asked his supervisor about a job and was told that he would have to wait and see. Around a week after first talking with his supervisor, the supervisor, Mark Ray, told Smith that Smith would keep his route. Smith's base pay changed from \$272 to \$185 a week and other changes occurred in his benefits package. Smith and Stewart were transferred from the old Earthgrains depot to the former CooperSmith depot around the time of the consolidation. In addition to reading the prepared statement at each location, Thomason and Snyder answered questions from employees. Thomason testified that he was sure he offered some employees opportunities to transfer and he based his determination to grant a transfer on whether Respondent had openings in other areas and whether the employee was qualified to help with the transition to the Earthgrains program. I find that activity constituted an additional violation of Section 8(a)(5) in that Respondent bypassed the Union and dealt directly with employees in the Meridian and Gulfport sales collective-bargaining contracts.

Jeff Gordey

In consideration of whether Gordey was discharged because of his union activity, I shall look to *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Andrex Industries Corp.*, 328 NLRB 1279 (1999); *Tres Estrellas de Oro*, 329 NLRB 50, fn. 3 (1999). In that regard, I shall determine whether the General Counsel proved that Respondent was motivated by union animus to discharge Gordey and, if so, whether Respondent proved that it would have discharged Gordey in the absence of union animus.

As shown herein there is evidence of animus, knowledge, and timing which tends to illustrate that General Counsel successfully proved that Respondent was motivated by its animus to discharge Gordey. However, there is a more obvious issue as to whether Gordey would have been discharged in the absence of union animus.

Respondent allegedly discharged Gordey because he did not show up for work for 2 consecutive days without notice. The record is not in dispute as to Gordey's absences. He missed both April 27 and 28, 1998. There is a dispute over whether Gordey called in his absences.

The Meridian sales collective-bargaining contract which was applicable to Columbus on April 30, did provide that Respondent may discharge an employee if the employee failed to report for work on 2 consecutive days without calling (J. Exh. 1, attachment I).

Gordey testified that he phoned Junior Supervisor Mike Taylor around 10 a.m. on Monday, April 27. Taylor told Gordey that Supervisor David Willis was running Gordey's route and Gordey said that he would call back after he went to the doctor. After visiting a doctor, Gordey phoned Willis and said that he would be out until Thursday. Both Taylor and Willis testified to the contrary that Gordey did not phone either of them on Monday.

Mike Taylor testified that he was paged while he was out on a route training a new employee, Darwin Turk, on April 27. Willis had paged Taylor to return and run Jeff Gordey's route because Gordey had not showed for work. Taylor recalled that he and Turk pulled out at 4 a.m. He returned because of the page around 10 a.m. and went out on Gordey's route. Taylor recalled returning to the depot around 6 p.m. Taylor denied that he talked with Jeff Gordey on April 27 or 28.

Willis did try and contact Gordey on Monday and he talked to Gordey's cousin about money that Gordey had for the purchase of a money order. Alleged discriminatee Thomas Neil testified that Jeff Gordey came in after Willis left for the evening. Willis testified that he called back and talked with Neil on April 27 and was told that Gordey had returned and left the money. Neil recalled that Gordey came in about 6:30 one evening before Gordey's discharge. Neil believed that was Tuesday. Gordey left a doctor's excuse in Willis' basket (GC Exh. 16; R. Exh. 17). Neil testified that Gordey asked Neil if Willis had said anything and that he had brought a doctor's statement. Gordey ran off a copy of that statement on the copy machine. Neil noticed that statement was from the hospital.²⁴ Gordey placed the copy in Willis' box and left. On cross-examination Neil admitted that Gordey brought in a money order one evening.

I must resolve conflicts in the above evidence. According to Gordey, he talked with Junior Supervisor Mike Taylor around 10 a.m. on Monday. Gordey testified that he phoned Willis after seeing a doctor late that day. He told Willis that he had been to the doctor. Taylor denied that he talked with Gordey. According to Taylor, he was on one run with a new employee when David Willis paged him to run Gordey's route. His recollection would place him on a route from 4 a.m. until 10 a.m., then on Gordey's route from 10 a.m. to 6 p.m. On the other hand, Gordey recalled that he overslept until around 10 a.m. when he phoned and talked with Mike Taylor and that Taylor told him that David Willis was driving Gordey's route. David Willis denied that he talked to Gordey on Monday. David Willis testified that he ran Morris Coleman's route on Monday, April 27. Coleman was on vacation. Willis left around 4 a.m. and returned to the depot around 2 p.m. Willis agreed with Taylor that Taylor was out training Darwin Turk from around 4 a.m. on April 27. Willis was paged at 9 or 9:30 a.m. by his supervisor, Eric Hollingshead. Hollingshead told Willis that Gordey had not showed up that morning. Willis then paged Mike Taylor after he unsuccessfully tried to contact Gordey by phone. He and Taylor decided that Darwin Turk was capable of finishing the route started by Turk and Taylor and that Taylor should return to the depot and run Gordey's route. Willis continued to page and phone Gordey throughout the day without success. Around 6 p.m. Willis left a message on Gordey's answering machine that Gordey had better return money he had left the depot with on Saturday for a money order. He received a call from someone identified as Gordey's cousin saying he was going to bring Jeff's money to the depot. Gordey waited until 7:30 p.m. The phone rang several times but the call was disconnected when Willis picked up. Willis phoned back around 8:15 p.m. and was told by Thomas Neil that Jeff Gordey had phoned then brought the money order in to the depot.

I am convinced on the basis of the entire record including my observation of the demeanor of the witnesses that Gordey did not phone in on Monday. His recollection that he first talked with Mike Taylor that morning conflicts with Taylor's testimony. Taylor's testimony on the other hand, is supported by the testimony of David Willis that Taylor was on one route and that he came in around 10 a.m. and drove Gordey's route. Although Gordey testified that Taylor told him that Willis was driving Gordey's route, the testimony of Taylor and Willis shows that Taylor, not Willis, covered Gordey's route that day. In view of my finding, I am convinced that Gordey did not inform Respondent that he was going to be absent on April 27 and 28. I find that the testimony of Thomas Neil was not in conflict with that of Willis and Taylor.

Moreover, there was no clear evidence that Gordey was treated in a disparate manner. David Willis admitted that he did not recall issuing any writeups for attendance during the 2 years he has been supervisor. According to Gordey's testimony, employee Tammy White had a lot of absences but was warned and not discharged. However, Respondent showed that employee Charles Bazzel was discharged on April 6, 1996, because he "did not report to work on Thursday 4-4-96 or Friday 4-5-06, Did not check his route up on Tuesday and had \$126.00 out of code" (R. Exh. 22). With that evidence and the record as a whole, there was no showing

²⁴ The hospital note shows that Jeffrey Gordey was admitted at 4:11 p.m. on April 27, 1998, with "chest pain."

that Respondent overlooked employees' absences without notice. The record failed to show that other employees missed 2 days without calling in and were not discharged.

I find that Respondent proved that Jeff Gordey would have been discharged on April 30 in the absence of union activity and Respondent's animus. I find that Respondent did not engage in action in violation of Section 8(a)(1) and (3) by discharging Jeff Gordey.

Nevertheless, the record did show that Respondent refused to process Gordey's grievance regarding his discharge. In view of my finding herein, that Respondent had an obligation to apply the terms of the collective-bargaining agreement to employees at the Columbus depot, I find that Respondent's refusal to consider Gordey's grievance constituted a violation of Section 8(a)(1) and (5) of the Act.

Tommy Neil

As in the case of the alleged illegal discharge of Jeff Gordey, I shall consider *Manno Electric*, supra; *Wright Line*, supra. See also *Andrex Industries Corp.*, supra; *Tres Estrellas de Oro*, supra. In that regard I shall determine whether General Counsel proved that Respondent was motivated by union animus to constructively discharge Neil and, if so, whether Respondent proved that it would have constructively discharged Neil in the absence of union animus. Again as in the case with Gordey, the record evidence proved Respondent's animus. Moreover, there was undisputed proof of motive in David Willis' comments to Neil. Neil testified and Willis admitted, that Willis told Neil that his promotion to route sales representative was prevented by Neil filing a grievance²⁵ against Respondent.²⁶ The General Counsel alleged that comment by Willis constituted an independent violation of Section 8(a)(1) and I agree.

That comment illustrated several things. First, of course, it illustrated Respondent's motivation in denying Neil a route sales representative job after it purchased CooperSmith. Second, it illustrated that Neil was aware of Respondent's decision to avoid promoting him because of his filing of the grievance. That second point was in Neil's mind when he resigned. He knew at that time, that his filing the grievance had affected his career with Respondent.

Respondent by refusing to process Neil's grievance engaged in conduct in violation of Section 8(a)(1) and (5) of the Act. By refusing to provide Neil with the promotion to route sales representative and by telling Neil that his filing of a grievance had prevented him getting that promotion, Respondent has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act. Neil, by resigning his employment at a point in time shortly after Respondent's unlawful action, did not waive his right to be promoted to route sales representative²⁷ and the evidence proved that Respondent's action contributed to Neil's resignation. I find in view of Willis' comments to Neil that he would already have a route sales job if he had not filed a grievance with the Union, shows that Neil would have been promoted before Gordey's discharge. The record shows that at least from the time employee Darwin Turk was hired shortly before Gordey's discharge, Neil should have been promoted to route sales representative. I find that Respondent engaged in a further violation of Section 8(a)(3) by constructively discharging Thomas Neil.

Independent 8(a)(1) activity

The record including admissions and no testimony in dispute of other evidence proved that Respondent engaged in several independent 8(a)(1) violations. In view of David Willis' admission, I credit the testimony of Tommy Neil. Neil testified that Willis told him that he could

²⁵ In view of Neil's demeanor, his testimony and the admissions by Willis, I credit Neil's testimony that Willis told him sometime in April or May "if I would leave the union alone and kept my nose clean, I would have got a route."

²⁶ Neil was promised a promotion to sales representative before the purchase of CooperSmith. Subsequently, he was again promised that promotion in March 1998.

²⁷ As shown above, I find that Respondent constructively discharged Tommy Neil. In case that finding is overturned on appeal, I find that Neil was unlawfully deprived of the route sales representative position when it hired Darwin Turk, and Neil is entitled to the job in remedy of Respondent's unlawful acts. Neil did not waive his right to the sales representative position by subsequently resigning.

have had a route and that he would get a route if he kept his nose clean and left the Union mess alone (Tr. 267, 404).

David Willis told Jeff Gordey on April 30 there was no grievance procedure because the Union did not represent Columbus employees. I also credit the following testimony, which was not rebutted. Lynn Carnahan told employee Steve Smith, "there ain't no union any more." Carnahan told employee Mark Stuart there was nothing the Union could do about Respondent's unilateral changes at Hattiesburg. Mark Ray told Stuart that Ron Thomason did not think too highly of Ray after he offered Stuart a supervisory position after Stuart had filed a grievance. Neither Carnahan nor Ray testified. I find that the above comments by Respondent's supervisors constitute independent violations of Section 8(a)(1). *Becker Group*, 329 NLRB 103 (1999).

CONCLUSIONS OF LAW

1. The Earthgrains Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Bakery, Confectionery and Tobacco Workers International Union, Local 149 is and has been a labor organization at material times.

3. Respondent by threatening its employees that employees would be denied route sales representative jobs for filing grievances under its collective-bargaining agreements; that employees would be given jobs if they kept their noses clean and left the union mess alone; that employees had no grievance procedure because they were not represented by the Union; that there was no union anymore; that there was nothing the Union could do about unilateral changes in working conditions and that supervision did not think highly of a supervisor that recommended the promotion of an employee that had filed a grievance; engaged in conduct in violation of Section 8(a)(1) of the Act.

4. Respondent, by denying a job of route sales representative and constructively discharging Thomas Neil, engaged in conduct in violation of Section 8(a)(1) and (3) of the Act.

5. Respondent, by refusing to recognize and bargain with the Union as representative of its route sales employees in its Columbus, Laurel, Hattiesburg, and Meridian depots; by refusing to apply the terms of the collective-bargaining contract to unit employees at its Columbus, Laurel, Hattiesburg, and Meridian depots; by bypassing the Union and dealing directly with unit employees; by unilaterally changing the terms and conditions of its unit employees employment and by unilaterally refusing to consider grievances²⁸ at its Columbus, Laurel, Hattiesburg, and Meridian depots; and by denying a grievance from employee Jeff Gordey, engaged in conduct in violation of Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

In view of my finding that Respondent unlawfully constructively discharged Thomas Neil and denied Neil advancement to a route sales representative job, I shall order Respondent to offer Neil immediate and full employment to a route sales representative job, or, if those positions no longer exist, to a substantially equivalent position. I order Respondent to erase all reference to the unlawful constructive termination of Thomas Neil. I further order Respondent to make Neil whole for any loss of earnings suffered as a result of the discrimination against him. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall make whole its bargaining unit employees for all loss of earnings and other benefits suffered as a result of its unlawful failure to apply the terms of the Meridian sales contract to Columbus and Meridian employees and its failure to apply the terms of the Gulfport sales contract to Laurel and Hattiesburg employees, and by its unilateral changes in working condition for unit employees at its Columbus, Laurel, Hattiesburg, and Meridian depots including changes in pay and benefits to unit employees at any time after the end of March 1998.²⁹ Money necessary to make employees whole under the terms of this remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th

Cir.1971), with interest thereon computed in accordance with *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁰

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is ordered that Respondent, The Earthgrains Company, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees that employees would be denied route sales representative jobs for filing grievances under its collective-bargaining agreement; threatening that employees would be given jobs if they kept their noses clean and left the Union mess alone; threatening that employees had no grievance procedure because they were not represented by the Union; threatening that there was no union anymore; threatening that there was nothing the Union could do about unilateral changes in working conditions, and threatening that supervision did not think highly of a supervisor that recommended the promotion of an employee that had filed a grievance.

(b) Constructively discharging and refusing to promote its employees because of the Union.

(c) Refusing to recognize and bargain, refusing to apply its collective-bargaining agreement to unit employees, bypassing the Union and dealing directly with unit employees, refusing to consider grievances under the collective-bargaining agreements and making unilateral changes in working conditions of unit employees at its depots in Columbus, Laurel, Hattiesburg, and Meridian, Mississippi.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer immediate and full employment to Thomas Neil to the position of route sales representative or if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and make Neil whole for any loss of earnings and other benefits suffered as a result of the discrimination against him plus interest, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the refusal to promote and constructive discharge of Thomas Neil and within 3 days thereafter notify Neil in writing that this has been done and that the refusal to promote and discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Recognize Bakery, Confectionery and Tobacco Workers International Union, Local 149,³¹ as the exclusive collective-bargaining representative of its Columbus, Laurel, Hattiesburg, and Meridian, Mississippi depot employees, continue in effect all the terms and conditions of the applicable collective-bargaining agreement and, on request, meet and bargain with Bakery, Confectionery and Tobacco Workers International Union, Local 149, as the exclusive collective-bargaining representative of its bargaining unit employees pursuant to the applicable collective-bargaining agreement. Nothing in this Order is to be construed as requiring or permitting the Respondent to rescind any improvements in terms and conditions of employment resulting from Respondent's refusal to apply the contract terms to all the respective unit employees, unless requested by the Union to make such recessions.

³⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³¹ Including its Trustee.

²⁸ As shown above grievances were attempted by Jeff Gordey, Robert Sharp (3/26/98), Billy Tucker (5/18/98), and David Mixon.

²⁹ *ABF Freight System*, supra.

(e) On request, make whole all bargaining unit employees at its Columbus, Laurel, Hattiesburg, and Meridian, Mississippi depots for all losses because of its unlawful refusal to apply the terms of the applicable collective-bargaining agreement and its unlawful unilateral changes in working conditions.

(f) Within 14 days after service by the Region, post at all its facilities in Mississippi, copies of the attached notice.³² Copies of the notice, on forms provided by the Regional Director for

Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Within 21 days after service by the Region, file with the Regional Director, Region 17, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

³² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."